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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC. and USF HOLLAND, INC.

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*

Respondents.

On Writ of Certiorari to the Court of Appeals of Michigan

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
BRUCE L. GOTTLIEB
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

* *Counsel of Record*

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and in every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in several hundred cases before this Court, and filed an *amicus* brief in this case urging the Court to grant the petition for a writ of certiorari.[1]

The Chamber and its members have a strong interest in this case because the decision of the Michigan Court of Appeals is fundamentally inconsistent with the core constitutional principle of free trade among the States. The federal Constitution was drafted to replace the Articles of Confederation largely to advance that principle, and it is critical to the conduct of American business that the United States remain a free trade zone. As this Court has emphasized, the Commerce Clause "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935).

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[1] Pursuant to Sup. Ct. R. 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief and their written consents accompany this brief.

Facially discriminatory tax burdens – those imposed on interstate but not intrastate commerce – are, of course, unconstitutional. But this Court has recognized that facially neutral flat taxes imposing "the full brunt, or . . . a major portion, of their burden" on out-of-state entities are also unconstitutional. *Am. Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 284 (1987). The Court has therefore insisted on "internal consistency" – "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Id.* at 284 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)).

The court below characterized the Michigan levy at issue as a "regulatory fee" rather than a "tax," and refused to apply the "internal consistency" standard for that reason. But constitutional principles should not turn on formalistic matters of characterization – whether denominated a "fee" or a "tax," a state levy may burden interstate commerce just the same. Because the lower court decision circumvents this Court's Commerce Clause jurisprudence and sets forth a roadmap for other courts and state legislatures to do the same – raising the specter of balkanization not only in the trucking industry, but throughout the national economy – the Chamber urges reversal.

STATEMENT OF THE CASE

This case involves a $100 charge assessed by Michigan on motor carriers transporting property within the State. *See* Michigan Compiled Laws § 478.2(1). The Michigan charge is functionally equivalent to the $36 per axle tax invalidated by this Court in *Scheiner*. As here, the *Scheiner* axle tax was facially neutral, applying both to vehicles registered in Pennsylvania and to vehicles registered in other states.

In *Scheiner*, this Court struck down the axle tax, applying the "internal consistency" standard developed in previous Commerce Clause cases from the requirements that state levies be "fairly apportioned" and "not discriminate against interstate commerce." 483 U.S. at 277. The Court reasoned that the axle tax was not "internally consistent" because "[i]f each state imposed" such a tax, "there is no conceivable doubt that commerce among the States would be deterred." *Id.* at 284. That was because, for example, a five-axle truck operating only in Pennsylvania would have to pay only one $180 fee, while a truck operating in 10 states would incur $1,800 in liability if other states were to enact the same tax. The Court accordingly concluded that "the axle tax has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the States that enacted the measure rather than 'among the several States.'" *Id.* at 286-87.[2]

In this case, the Michigan appellate court declined to apply the "internal consistency" test at all. Applying state law principles, the lower court found that the $100 charge

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[2] The *Scheiner* Court also invalidated a $25 "marker fee" applicable to out-of-state vehicles, which in-state vehicles were "deemed" to pay through their Pennsylvania registration fee. *See* 483 U.S. at 281-86.

was not a tax, but a "regulatory fee," because "it is a fee imposed for the administration of the MCA [the Michigan Carrier Act], particularly covering costs of enforcing safety regulations." JA 83, 91-96. The lower court held that conclusion dispositive of the federal Commerce Clause issue. In a terse footnote, the court ruled that the internal consistency test did not apply because it "is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, . . . not regulatory statutes." JA 99 n.15. The court proceeded to apply the more lenient "balancing" test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which pertains to regulations rather than assessments. JA 101-102. The court concluded: "[W]e cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." *Id.*

SUMMARY OF ARGUMENT

This case presents an issue of great importance to American business because the decision below unsettles a central precept of dormant Commerce Clause jurisprudence, and in a way that cannot be confined to the circumstances of this case. It is black-letter law that state taxes must be "internally consistent," such that "'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Scheiner*, 483 U.S. at 284 (quoting *Armco*, 467 U.S. at 644)). It is also abundantly clear that Michigan's $100 charge for engaging in intrastate motor carriage flunks the internal consistency test and discourages the free flow of commerce among the states.

The lower court avoided reaching that conclusion only by holding the charge at issue to be a "regulatory fee" rather

than a "tax." That distinction has no place in Commerce Clause jurisprudence: the burden on interstate commerce does not depend on whether an assessment is labeled a "fee" or a "tax," and there is accordingly no sound basis for applying the internal consistency test only to the latter. If other courts and state legislatures were to adopt the Michigan court's approach, it would lead to nullification of several of this Court's recent dormant Commerce Clause decisions involving motor carriers, as well as decisions dating back many years involving other forms of interstate commerce. The decision below thus threatens not only the trucking industry, but other participants in interstate commerce as well.

This case cannot reasonably be distinguished from *Scheiner* on the ground that the Michigan fee applies only if a trucker *chooses* to pick up and deliver a load in Michigan. This Court's modern jurisprudence simply leaves no room for justifying a discriminatory tax on the basis that it can be avoided by choosing not to do business in a State. Moreover, the Michigan fee has a protectionist component as well as a discriminatory component – because it discourages interstate truckers from competing with in-State trucks for loads within the State – and it is thus even more troubling than the axle tax this Court invalidated in *Scheiner*.

ARGUMENT

I. *SCHEINER* PLAINLY DEMONSTRATES WHY THE INTERNAL CONSISTENCY TEST SHOULD APPLY TO "REGULATORY FEES" AS WELL AS TO "TAXES."

The Michigan court's decision injects an irrelevant and potentially dangerous distinction between "taxes" and

"regulatory fees" into the presently straightforward application of the "internal consistency" test. Because the $100 assessment confers on a motor carrier only the narrow "right to operate its trucks in Michigan" and is "credited" directly to the Michigan Public Service Commission to be spent enforcing the State's motor carrier regulations, the court concluded that "the primary purpose of [the] fee is regulatory in nature." JA 91, 93.[3] The Chamber has no quarrel with that conclusion as a matter of Michigan law and recognizes that the fee/tax distinction is often relevant to assessing uniformity and equality under state constitutional provisions.[4]

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[3] The court below reached the fee/tax question in the course of dismissing plaintiffs' challenge to the $100 fee under the state constitution's Uniform Taxation Clause. JA 91-96 & n.14.

[4] *See* Jerome R. Hellerstein & Walter Hellerstein, State Taxation § 2.01 & §2.01[1] at 2-2 – 2-4 (3d ed. 1999 & Supp. No. 2 2004) ("Almost all the state constitutions contain provisions requiring taxes to be uniform or equal or both. . . . Because state uniformity and equality provisions generally apply only to taxes, the question often arises whether a particular exaction constitutes a tax that is subject to the constitutional restriction, or a fee or charge that need not be uniform or equal. . . . The factors courts use to distinguish fees from taxes include (1) whether the payment was voluntary (fee) or involuntary (tax); (2) whether the payment was for a specific governmental benefit (fee) or for general governmental purposes (tax); (3) whether the payment was made into a segregated fund (fee) or paid into the general treasury (tax); and (4) whether the payment was imposed by a regulatory agency upon those subject to regulation (fee) or to defray general governmental expenditures (tax)."); *see also San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, C.J.) (collecting federal cases in which statutory language or purpose made the tax/fee distinction determinative).

The Chamber submits, however, that this state law distinction has never been relevant under the Commerce Clause, and for good reason. To begin with, *Scheiner*'s bare facts prove that a state levy is not immunized from the internal consistency test just because it exhibits some characteristics of a "regulatory fee." Indeed, the *Scheiner* levy was as much a "regulatory fee" as the levy here: It conferred only the narrow right to operate a truck in Pennsylvania and payments of the levy were "'credited to the Motor License fund and expended exclusively for road-related purposes.'" *Am. Trucking Ass'n. v. Scheiner*, 509 A.2d 838, 840 (Pa. 1986) (quoting Joint Stipulation of Facts). Yet the *Scheiner* Court found the internal consistency test applicable and held "the unapportioned flat tax[]" unconstitutional. 483 U.S. at 284. In fact, the administrative earmarking of the *Scheiner* tax for regulatory expenses was not even *mentioned* in the eight pages of this Court's decision that "describe[d] the challenged taxes in some detail." *Id.* at 269. The clear import of that omission is that the factors distinguishing fees from taxes under state law have nothing to do with the concerns of the Commerce Clause.

Other aspects of the *Scheiner* Court's reasoning underscore the irrelevance of the tax/fee distinction. In particular, the decision explains that even facially neutral "unapportioned flat taxes" on interstate motor carriers "penalize some travel within the free trade area" protected by the Commerce Clause, 483 U.S. at 284, by imposing a greater per-mile burden on out-of-state operators than on in-state operators. *Id.* at 291. The internal consistency test highlights the grave danger to interstate commerce these taxes pose – if every state were free to impose such a tax and every state did so, travel among the states would be discouraged. And even if only *one* state were to impose such

a tax, the *Scheiner* court explained, the "inevitable effect" would still be "to threaten the free movement of commerce by placing a financial barrier around" that state. *Id.* at 284.

The crucial implication of *Scheiner*'s reasoning for present purposes is that whether "commerce among the States w[ill] be deterred" depends only upon whether motor carriers must pay a flat sum – however labeled. 483 U.S. at 284. An out-of-state motor carrier that must pay that charge will be no less deterred if revenue is earmarked for a regulatory fund or because the obligation to pay attaches to other businesses besides motor carriage. As this Court has noted in a closely related context, "a focus on . . . formalism merely obscures the question whether the tax produces a forbidden *effect*." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (emphasis added) (rejecting the archaic distinction between impermissible taxes upon the privilege of doing business and permissible franchise taxes); *see also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 181 (1995) ("pragmatism . . . has . . . become our aspiration in this quarter of the law").[5] The only constitutionally relevant inquiry is whether the "tax" or "fee" unduly interferes with free trade – and the internal consistency test provides the answer under either rubric.

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[5] *Complete Auto* also synthesized existing precedent to formulate the modern four-part analytic framework: the Court "sustain[s] a [state] tax against Commerce Clause challenge when [1] the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279. The internal consistency standard has developed from the second and third prongs of this test. *See Jefferson Lines*, 514 U.S. at 185; *Scheiner*, 483 U.S. at 277; *Armco*, 467 U.S. at 644.

Academic commentary reinforces the point that it is the practical burden on commerce – and not the label "tax" or "fee" – that implicates core Commerce Clause concerns. "From an economic standpoint," "fees[] and taxes are analytically the same." Jerry Hausman and Howard Shelanski, *Economic Welfare And Telecommunications Regulation: The E-Rate Policy For Universal-Service Subsidies*, 16 Yale J. Reg. 19, 22 n. 59 (1999). Certainly that is true for Commerce Clause purposes under the internal consistency test. As Professor Hellerstein has noted, "the evils that the 'internal consistency' test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power," and therefore no "sound policy basis . . . distinguish[es] the 'fee' from the 'tax' cases." Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 157 (1988).

Nor is it likely that the functional equivalence between fees and taxes would be lost on the states. In practice, the line between "regulatory fees" and "taxes" is far from clear, and has been criticized as analytically unsatisfying. *See generally* Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335 (2003); Major Cotell and Lieutenant Colonel Jaynes, *Regulatory Fees . . . Or Taxes: Sorting Out The Difference*, 1999 Army Law. 32. State courts inclined to uphold state money-raising measures (whether "taxes" or "fees") could simply adjust the line between those categories to expand the "fee" category and correspondingly contract the "tax" category. Indeed, the court below addressed the question as a matter of state law – an approach that would, if generally applied, maximize state courts' ability to determine outcomes under the federal Commerce Clause by re-categorizing levies as "fees."

Similarly, state legislatures and agencies could also shift "taxes" to "fees" merely by (1) limiting their application to specific kinds of businesses subject to regulation by a particular agency and (2) administratively earmarking the proceeds to fund specific regulatory expenses. Enforcement of the Constitution's guarantee of a free trade zone among the States should not be left to turn on this uncertain and easily manipulated distinction.

II. THE TAX/FEE DISTINCTION, IF INDULGED, WOULD AFFECT FAR MORE THAN JUST THE RIGHTS OF MOTOR CARRIERS.

The decision below would not only nullify *Scheiner* and related decisions of this Court involving motor carriers, but would also eviscerate decades of precedent regarding other areas of interstate commerce. For example, in a series of decisions between 1887 and 1946, this Court held that states are not permitted to impose flat taxes on "drummers" – traveling sales merchants who displayed their goods and took orders. *See Nippert v. Richmond*, 327 U.S. 416 (1946); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887). In each case, the taxing authority defended the levy on the ground that it was facially neutral. *Nippert*, 327 U.S. at 431; *Best & Co.*, 311 U.S. at 456; *Robbins*, 120 U.S. at 497. In each case, this Court rejected the argument, observing that in-state businesses generally do not need drummers and may instead rely on their ordinary retail operations. Because of limited demand for drummers among in-state businesses, the facially neutral tax would inevitably work to the disadvantage of out-of-state businesses. As the *Scheiner* Court observed, the invalidity of these taxes is even clearer under the modern internal consistency test. If each taxing jurisdiction assessed

a flat levy for the privilege of drumming, "there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284 & n.16.

The most recent of the Court's drummer decisions emphasized that their reasoning applies to any service or line of business utilized primarily by out-of-state entities: "The drummer is a figure representative of a by-gone day. But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify." *Nippert*, 327 U.S. at 435 (cited by *Scheiner*, 483 U.S. at 281 n.12). Even today, the drummer cases – now incorporated into the familiar four-part *Complete Auto* test, *see supra* n.5 – protect modern salespeople against facially neutral but nevertheless discriminatory taxes. *See, e.g., Homier Distributing Co. v. City of Albany*, 90 N.Y.2d 153 (N.Y. 1997) (citing *Nippert* as well as the *Complete Auto* test in finding unconstitutional a facially neutral state tax on "transient" retailers who operate at temporary business sites).

The lower court's analysis according dispositive weight to the fee/tax distinction would eliminate the important practical protections afforded by the drummer cases and their modern progeny. States would be free to charge traveling salespeople unapportioned flat "regulatory fees," or perhaps even to charge such fees for the privilege of distributing mail-order catalogs within a state. States could simply earmark the proceeds of such levies for regulatory programs (curbing abusive sales tactics in the case of salespeople, for example, or litter in the case of catalogs), and defend them as "fees" rather than "taxes." The lenient *Pike Church* balancing test might then apply to this facially neutral "regulation." The demand for such protectionist measures would likely be enormous: In the pre-*Robbins* era it is estimated that over 800 municipal ordinances directed at

drummers were enacted for the purpose of protecting local merchants. Hellerstein & Hellerstein, State Taxation ¶ 4.13[2][a][i] 4-74 & n.317. And the consequent effect on interstate commerce would surely be crippling.

A more recent line of cases prohibiting states from offering discriminatory multiple tax exemptions is also jeopardized by the artificial fee/tax distinction endorsed by the court below. In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), for example, the Court invalidated a Washington State manufacturing tax that exempted taxpayers already subject to Washington's wholesaling tax. Applying the internal consistency test, the Court reasoned that if every state followed Washington's lead, manufacturers would be induced to wholesale their goods in the state of manufacture – to the detriment of free-flowing interstate commerce. In-state manufacturers selling at wholesale would pay only one tax (the wholesale tax) – they would be exempt under the multiple tax exemption from paying their state's manufacturing tax. But manufacturers selling at wholesale out of state would have to pay two taxes (their own state's manufacturing tax and the other state's wholesaling tax). The internal consistency test is a useful tool for revealing the hidden discriminatory effect of such tax schemes.

If the tax/fee distinction proposed by the court below were to be indulged, however, the states could simply restyle *Tyler Pipe*-style manufacturing and wholesale tax regimes favoring in-state companies as "regulatory fees" assessed to defray the costs of enforcing, for instance, state labor, product safety, and environmental regulations. The states could reasonably argue that enforcing manufacturing regulations against a business is less expensive if the state is already enforcing wholesaling regulations against that same entity (*e.g.*, the state would only have to inspect the

company's books once). The pressure on businesses to locate their manufacturing and wholesaling operations in a single state would be just as strong as in *Tyler Pipe* (or *Armco*) but, under the lower court's erroneous view, the discriminatory effects of the scheme would receive only lenient *Pike Church* scrutiny. As with the drumming cases, the lower court decision would re-open long-settled issues that potentially affect not merely trucking, but a wide variety of industries.

In sum, the early drummer decisions, the modern *Complete Auto* test that synthesized then-existing cases, the internal consistency standard, and the body of modern cases applying these complex rules were all designed to take account of the unique problems of discrimination (both intentional and inadvertent) that arise when multiple taxing authorities assert simultaneous jurisdiction over multi-state and multi-national businesses. In particular, this Court has established the internal consistency standard to reveal the discriminatory effect of the flat taxes in *Scheiner* and the multiple tax exemptions in *Armco* and *Tyler Pipe*, as well as to demonstrate the *non*-discriminatory effect of the sales taxes on interstate traffic addressed in *Goldberg v. Sweet*, 488 U.S. 252 (1989) (upholding sales tax on certain interstate telephone calls made within the state) and *Jefferson Lines*, 514 U.S. 175 (upholding sales tax on the value of interstate bus tickets sold within the state). *See generally* Hellerstein, 87 Mich. L. Rev. 138 (arguing that the internal consistency test serves to prevent multiple jurisdictions from imposing multiple taxes on the same activity). "Regulatory fees" – because they are analytically identical to taxes – raise these same questions under a different label: unapportioned flat fees, multiple fee exemptions, ad valorem fees involving interstate activity, and so forth, can have the same effects as "taxes." Thus, even were this a case of first impression and

Scheiner less plainly dispositive, it would still be necessary to find "regulatory fees" subject to the branch of Commerce Clause doctrine that evolved to deal with taxes rather than the branch that evolved to deal with regulations.

Finally, the Chamber does not intend to suggest that all state assessments fail the internal consistency test. For example, as this Court explained in *Scheiner*, fuel consumption taxes are directly apportioned to the miles traveled in a particular state, and therefore permissible under the Commerce Clause. *See* 483 U.S. at 283. Other sorts of user fees that would not burden interstate commerce even if applied by all States – such as the $1 charge for airline passengers at issue in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which was a reasonable approximation of the cost of using the facilities -- are likewise permissible. *See* Hellerstein, 87 Mich. L. Rev. at 157-58. But the $100 assessment at issue in this case is not; because Michigan's levy is entirely unapportioned, its burden plainly falls more heavily on carriers operating both intra- and inter-state than on those operating only within the state. That places the former at a distinct disadvantage in the Michigan market. Moreover, if other states were to impose such a levy, interstate carriers would be further disadvantaged. Accordingly, Michigan's assessment – like the axle levy invalidated in *Scheiner* – fails the internal consistency test and impermissibly burdens interstate commerce regardless of whether it is called a tax or a fee.

III. OLDER CASES SUGGESTING THAT STATES MAY IMPOSE FLAT TAXES ON INTRASTATE MOTOR ROUTES WERE OVERRULED BY *SCHEINER* AND OTHER MODERN CASES.

In *Osborne v. Florida*, 164 U.S. 650 (1897), and *Pullman Co. v. Adams*, 189 U.S. 420 (1903), this Court approved unapportioned flat taxes on express companies that provided intrastate shipping services as well as interstate shipping services. In both cases, the Court explained that a tax tied to the provision of interstate shipping services would clearly have been unconstitutional, but stated that regulation of purely intrastate shipments does not "improperly affect[] interstate commerce." *Osborne*, 164 U.S. at 655; *Pullman Co.*, 189 U.S. at 422 ("The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."). Those cases are not controlling because the two critical assumptions on which they are based are no longer valid.

First, the cases are inconsistent with the modern rule that taxation of wholly intrastate activity can affect interstate commerce and therefore must pass constitutional muster. In *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564 (1997), for example, the Court considered the constitutionality of a Maine tax exemption for "benevolent and charitable institutions." *Id.* at 568 (internal quotations omitted). The petitioner, a summer camp run by a church, was not entitled to a tax exemption because 95% of its campers came from outside Maine. *Id.* at 567. The taxing authority argued that the dormant Commerce Clause did not reach purely intrastate activities and that "the camp's 'product is delivered and "consumed" entirely within Maine.'" *Id.* at 572 (quoting the Town's brief). The Court rejected that argument, citing a string of cases decided under the affirmative Commerce Clause that had found purely local

activities to affect interstate commerce. *Id.* at 572-73 (*citing, inter alia, Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964)). As the Court explained, "[e]ven when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." 520 U.S. at 573 (internal quotation marks omitted). Similarly, in *Commonwealth Edison Co. v. Montana* , 453 U.S. 609, 615 (1981), the Court applied the *Complete Auto* four-part test to a severance tax applicable to coal mined in-state, holding that it had "long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity."

Second, the older cases also fail to account for the modern rule that state taxes must be apportioned. As noted above, *Scheiner* held that the apportionment requirement, as measured through the internal consistency test, requires flat taxes to be justified on the ground that "they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." 483 U.S. at 296. Indeed, in *Scheiner* the Court expressly overruled three older decisions that had affirmed flat taxes on interstate highway traffic on the ground that they relied on superseded formalistic distinctions. 483 U.S. at 292-96 (overruling *Clark v. Poor*, 274 U.S. 554 (1927), *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 295 U.S. 285 (1935), and *Aero Mayflower Transit Co. v. Bd. of Ry. Comm'rs*, 332 U.S. 495 (1947)).

Taken together, this Court's recent rulings establish that (1) taxation of purely intrastate activity implicates dormant Commerce Clause concerns and (2) facially neutral unapportioned flat taxes are unconstitutional unless

apportioning would be infeasible. *Osborne* and *Pullman Co.* are no longer valid because they are inconsistent with those principles.

Moreover, it would not be sensible to distinguish this case from *Scheiner* on the ground that the Michigan fee applies only if a trucker picks up a load in Michigan for delivery in the State, while the Pennsylvania axle tax applied to any truck entering the state. As we have shown, the Michigan fee, like the Pennsylvania axle tax, has a discriminatory effect, penalizing truckers that do business outside of Michigan as well as within the State. The Michigan fee also has a protectionist component, since it discourages interstate truckers from picking up loads in Michigan for delivery in the State, hence limiting competition with in-State truckers. The Pennsylvania axle tax, in contrast, had no such protectionist effect. It would be a curious distinction to preserve state laws that have a protectionist *and* a discriminatory effect from Commerce Clause challenge, while striking down state laws that have a discriminatory effect only.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
BRUCE L. GOTTLIEB
HARRIS, WILTSHIRE &
GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730 1300

* *Counsel of Record*

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